

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39945
Docket No. MW-39794
09-3-NRAB-00003-060639
(06-3-639)**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign Mechanic E. Letts to perform planned overtime prior to the beginning of the regular shift on cited work dates beginning on July 12 and continuing through August 29, 2005 and instead called and assigned junior employee J. Powell (System File NEC-BMWE-SD-4549 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Letts shall now be compensated 25 (twenty-five) hours at his respective overtime rate, plus any other appropriate relief. The Organization will require that the claimant be made whole in every way for any loss resulting from Management’s violation and that all lost credits and benefits normally due must be included in this settlement.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On the dates in question, the Claimant and J. Powell both held seniority as B & B Mechanics and were both regularly assigned to Gang C-162, headquartered at Perryville, Maryland, with regular tours of duty of 7:00 A.M. to 3:30 P.M., Monday through Friday. The Carrier assigned Powell to assist Bridge Rehabilitation Gang R-901, which required him to report one hour early each day on an overtime basis. Both the Claimant and Powell assisted Gang R-901 on an overtime basis at the end of their regular shifts. The Claimant had greater seniority than Powell and the Organization contends that the Claimant should have been afforded the opportunity for the pre-shift overtime in accordance with his seniority.

The initial claim alleged that the Carrier "violated the collective bargaining agreement, including, but not limited to Rule 55" by scheduling Powell rather than the Claimant for the pre-shift overtime. The Division Engineer responded:

"Mr. Jeff Powell was temporarily assigned to work with our bridge and rehabilitation gang on the Susquehanna Bridge tie project. All overtime was performed continuous with his regular tour under Rule 44 (A). The overtime in question was not assigned subject to Rule 55."

The Organization appealed and argued, among other things, that any such temporary assignment violated Rules 1 and 3. The Division Manager Labor Relations responded that the Organization had amended the claim on appeal, rendering it fatally flawed procedurally, and reiterating the position that the overtime at issue was continuous with Powell's regular assignment and not subject to Rule 55. The parties maintained their positions through the remainder of the on-property handling and before the Board.

We consider the Carrier's procedural argument first. The Carrier contends that by alleging violations of Rule 1 and 3 in the appeal to the Division Manager Labor Relations the Organization improperly amended the claim and it now must be dismissed. The Carrier relies on Third Division Awards 36020, 29272 and 15847 in support of its position. However, we are unable to agree with the Carrier's position.

We considered the Awards cited by the Carrier carefully. They do not support dismissal of the instant claim. In Award 36020, the Organization filed a claim that the Carrier violated the Agreement when it failed to award Position No. 05-030-6891-3347-0. On appeal from denial of the initial claim, the Organization realized that Position No. 05-030-6891-3347-0 had been properly filled and claimed that the Claimant should have been awarded Position No. 05-030-6891-3348-8. The Board held that the Organization had improperly amended the claim and dismissed the claim as procedurally flawed.

In Award 15847, the Organization filed a claim on behalf of a dismissed employee seeking restoration to service with seniority unimpaired. For the first time before the Board, the Organization added a request for vacation rights unimpaired and compensation for lost wages. The Board dismissed the claim as procedurally flawed.

The instant case is unlike these prior Awards. In Award 36020, the initial claim protested the failure to award a specific position to the Claimant. On appeal, the Organization amended the claim to assert the failure to award a different position to the Claimant. But that was an entirely separate claim from the claim that was filed initially. Initially, the claim sought the award of Position No. 05-030-6891-3347-0. The amended claim sought the award of Position No. 05-030-6891-3348-8, which would be an entirely different claim. The Board properly dismissed the new claim for not having been presented originally at the first level on the property. In Award 15847, the claim as presented to the Board sought relief that was never sought during handling on the property and thus never properly presented. The Board properly dismissed the claim.

In contrast, the instant claim has, at every level, focused on the identical action – the assignment to Powell ahead of the Claimant of one hour of pre-shift overtime on 25 days. At every level, the claim alleged a violation of Rule 55 and

sought the identical relief – 25 hours' pay at the overtime rate. The Organization added citations to Rules 1 and 3 only in rebuttal to the Division Engineer's argument in denying the claim that the overtime in question was not subject to Rule 55 because it was continuous with Powell's regular assignment. We conclude that the addition of the citations to Rules 1 and 3 under the circumstances did not constitute such an amendment of the claim as to render it so procedurally flawed that it would require dismissal.¹

The Carrier asserts before the Board, as it did throughout the handling on the property, that the overtime in question was continuous with Powell's regular assignment and, therefore, was not subject to Rule 55. As a general matter, the Carrier is correct. See Third Division Award 37828. However, the record reflects significant differences between the instant case and the typical case of overtime worked continuous with a regular assignment. Both the Claimant and Powell were regularly assigned to B & B Gang C-162. The Carrier contended on the property that "Powell was not assigned to a temporary position or vacancy which existed in Gang R901" but "merely performed B&B Mechanic duties assisting the Bridge Rehabilitation Gang during his regular assigned tour of duty." Both the Claimant and Powell were assigned overtime work assisting Gang R-901 following completion of their regular tours of duty, but only Powell was assigned overtime work one hour before the start of his regular tour of duty. There is nothing in the record that explains why the one hour of pre-shift overtime had to be assigned to Powell rather than to the Claimant. The Claimant had greater seniority and should have been given the opportunity to work the overtime. On the peculiar facts presented, we conclude that the Carrier violated Rule 55(a)'s command that "[e]mployees . . . if qualified and available, be given preference for overtime work . . . in order of their seniority."

The claim seeks payment of 25 hours at the overtime rate. It is well-established that the practice on this property is to pay for missed overtime

¹Award 29272 adds nothing to the Carrier's argument. In that case, the Board dismissed the claim because it was not filed in a timely manner. It then added, "Moreover, we note that the claim of one of the Claimants was amended on appeal and, on that basis, must hold it to be procedurally defective." Apart from this one cryptic sentence, there is nothing in the Award which indicates how the claim was amended, thereby undermining the precedential value of the Award.

opportunities at the straight time rate and the majority of Awards on this property follow this practice. See, e.g. Third Division Awards 35863 and 31129. Accordingly, we will sustain the claim, but only at the straight time rate.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 30th day of September 2009.